STATE OF MICHIGAN

COURT OF APPEALS

CODING PRODUCTS, INC.,

Plaintiff-Appellant,

v

HALE COMPANY OF LOWER MICHIGAN, INC. and HALE COMPANY OF MICHIGAN, INC.,

Defendants-Appellees.

UNPUBLISHED
February 27, 1998

No. 200406
Kalkaska Circuit Court
LC No. 96-005562-CP

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's[1] motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). We affirm.

This claim was initiated after toxic solvents leaked from a storage and transport system, purchased from and installed by defendant, and caused substantial environmental damage. Plaintiff sought consequential damages for breach of contract, negligence, breach of implied warranties of merchantability and fitness for a particular purchase, breach of express warranty, and a violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*.; MSA 19.418(1) *et seq*. In granting defendant's motion for summary disposition, the trial court found that the contract unambiguously placed the risk of the consequential environmental damage on plaintiff. Appellate review of a motion for summary disposition is de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; ___ NW2d ___ (1998).

Plaintiff first argues that the trial court misinterpreted the word "above" in a clause in the contract which read as follows:

> Acceptance of proposal: The *above* prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above. [Emphasis added].

Plaintiff claims that the word "above" unambiguously describes the words "prices, specifications and conditions" and that, therefore, plaintiff did not accept the "conditions," including a limitation of remedies clause located on the reverse side of the contract, because these terms were not "above" the signature line.

The principal aim in the interpretation of contracts is to ascertain the intention of the parties. *D'Anvanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). When ascertaining the contractual intent of the parties, the trial court is concerned with objective manifestations of this intent and not with subjective, hypothetical, unexpressed, or nonexistent intentions of the parties. *Sprague v General Motors Corp*, 843 F Supp 266, 306 (ED Mich, 1994). Courts are to determine the intent of the parties from the words used in the contract itself. *Zurich Ins Co v CCR & Co (On Rehearing)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 199184, issued 11/25/97), slip op, p 2, citing *Michigan Chandelier Co v Morse*, 297 Mich 41, 49; 297 NW 64 (1941). Where the terms of the contract are unambiguous, its construction is for the court to determine as a matter of law, and the plain meaning of the terms may not be impeached with extrinsic evidence. *Zurich Ins Co, supra*, p 3.

Plaintiff cannot reasonably claim that it intended to only accept the terms that were "above" the signature line. From an objective stance, no reasonable person with reasonable business savvy would examine the contract supplied by defendant and consider the terms on the reverse side to be mere surplusage. Moreover, the circumstances surrounding the execution of the contract indicate that the parties intended the terms on the reverse to be included. Plaintiff's agent, who signed the contract, testified that before execution he looked at the reverse side and was aware that it contained additional contract terms. Under contract principles, one who signs a contract cannot seek to invalidate it on the basis that he did not read it or thought its terms were different, absent a showing of fraud or mutual mistake. *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 599; 513 NW2d 187 (1994). Finally, even if plaintiff did subjectively attach a different meaning to the language in question, it had reason to know of the alternative meaning attached by defendant based on its agent's admitted knowledge of additional terms on the reverse side. The meaning attached by defendant prevails because defendant was unaware of any alternative meaning attached by plaintiff. Restatement Contracts, 2d, § 201(2)(a). Therefore, the trial court correctly found that the language of the contract unambiguously included the conditions on the reverse side of the document, including the limitation of remedies clause.

Plaintiff next argues, in contradiction to its previous argument, that the acceptance clause was ambiguous regarding whether the word "above" in the acceptance clause describes "price, specifications and conditions" or only "price." Plaintiff asserts that if the clause is ambiguous, it must be construed against defendant, the drafter, consistent with Restatement Contracts, 2d, § 206. Plaintiff then asserts essentially the same argument--that when construed against the drafters, "above" describes "conditions," and therefore did not include the conditions on the reverse side of the contract. However, the contract need not be construed against the drafter because, as previously determined, there was no ambiguity.

Plaintiff next argues that the failure of defendant to specifically disclaim negligence in its limitation of remedy clause required the trial court to find the clause unenforceable with regard to its tort claim.

Michigan has adopted the "economic loss" doctrine, which, for transactions under the purview of the Uniform Commercial Code (UCC), MCL 440.1101 *et seq.*; MSA 19.1101 *et seq*., bars tort recovery and limits remedies to those available under the UCC. *Neibarger v Universal Cooperatives Inc*, 439 Mich 512, 529; 486 NW2d 612 (1992). The contract between the parties was a hybrid sales/service contract because it involved a sale of goods, namely the sale of components comprising the storage and transport system, and a sale of services, namely the installation of the system. In hybrid sales/services contracts, we use the "predominant factor" test to determine whether the transaction comes under the UCC. *Neibarger, supra*, p 534.

> The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved. [*Id.*, p 534, quoting *Bonebrake v Cox*, 499 F2d 951, 960 (CA 8, 1974).]

This contract for the sale and installation of an above ground solvent storage and transport system appears to have been predominately for the sale of goods. The contract's primary purpose hinges upon the purchase of the goods rather than the rendition of services. The actual language of the contract details all the component parts of the system. Also, the component parts constituted $174,299 of the total contract price of $263,769. Thus, applying the predominate factor test to this case, the parties' contract was predominately for the sale of goods and fell under the purview of the UCC. Plaintiff's tort claims were therefore barred based on the economic loss doctrine and defendant's specific disclaimer of tort liability was therefore immaterial.

Plaintiff next argues that the MCPA required that the disclaimer of liability be conspicuous and that the trial court should have found defendant's limitation of remedies clause unenforceable because it was inconspicuous. The MCPA proscribes enumerated unfair trade practices in the conduct of "trade or commerce." MCL 445.903(1); MSA 19.418.(3)(1). The applicability of the MCPA to certain transactions has hinged on the definition of "trade or commerce:"

> "Trade or commerce" means the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity. [MCL 445.902(d); MSA 19.418(2)(d).]

In *Catallo v MacDonald & Goren*, 186 Mich App 571, 572-573; 465 NW2d 28 (1990), this Court held that a law firm could maintain a cause of action under the MCPA for overcharges for office furnishings because they were for "personal" use and "corporation" was included in the definition of "person" in the statute. In contrast, an above ground solvent transport and storage system exhibits none of the attributes of a "personal, family, or household" good or service. Consumer households would not install such a system for their use. Moreover, unlike the "furnishings" in *Catallo*, the system at issue could never be used in a personal or household capacity. Therefore, the above ground solvent storage

and transport system was not a "good" provided by defendant for "personal, family, or household" use and the MCPA does not apply.

Plaintiff next argues that because the limitation of remedies clause was inconspicuous, it is unenforceable under MCL 440.2316(2); MSA 19.2316(2), a UCC provision that requires disclaimers of implied warranties to be "conspicuous." This contract, however, contained no clause that attempted to disclaim UCC implied warranties. The UCC permits parties to limit their remedies and avoid consequential damages. MCL 440.2719; MSA 19.440.2719. This section of the UCC does not, however, make "conspicuousness" a requirement for enforceability.

Plaintiff next argues that the limitation of remedies clause was unconscionable. Procedural unconscionability examines the "real and voluntary meeting of the minds" at the time the contract was executed and considers factors such as: (1) relative bargaining power; (2) age; (3) education; (4) intelligence; (5) business savvy and experience; (6) the drafter of the contract; and (7) whether the terms were explained to the "weaker" party. *Johnson v Mobil Oil Corp*, 415 F Supp 264 (DDC, 1976). Substantive unconscionability inquires whether the disputed term is commercially reasonable. *Id.* With regard to procedural unconscionability, it appears that both parties are commercial entities with comparable bargaining power and business savvy. Moreover, plaintiff's agent, who executed the contract, testified that he read the front of the contract and glanced at the reverse side where the limitation of remedies clause was located. Even if plaintiff's agent did not specifically read the clause in question, it does not relieve plaintiff of the obligations under the contract. *DeValerio v Vic Tanny Int'l,* 140 Mich App 176, 179-180; 363 NW2d 447 (1984), citing *Raska v Farm Bureau Mutual Ins Co of Michigan*, 412 Mich 355, 362-363; 314 NW2d 440 (1982). Because both parties were corporate entities with comparable bargaining power, there was no procedural unconscionability.

Plaintiff next argues that the clause is unconscionable because plaintiff's actual damages were nominal and an inability to recover consequential damages will leave it with no substantive remedy under the contract. The parties to a contract may limit their potential damages or modify the remedies for breach unless it would be unconscionable. MCL 440.2719; MSA 19.2719. The UCC addresses unconscionability in MCL 440.2302; MSA 19.2302, which requires that a commercial entity claiming unconscionability bear the burden of establishing a prima facie showing of unconscionability, which the party seeking to enforce the contract would then have to rebut. *Citizens Ins Co v Proctor & Schwartz, Inc*, 802 F Supp 133, 144 (WD Mich, 1992). Unconscionability in a commercial setting is rarely found by the courts. *Id.*, p 143. Here, plaintiff provided the testimony of its agent who stated that he read the front of the contract, "skimmed" the terms and conditions on the reverse side, and did not pay particular attention to the limitation of remedies clause. This evidence falls considerably short of establishing procedural unfairness or disproportionate bargaining power. Therefore, the trial court correctly decided that the contract was not unconscionable.

Finally, plaintiff argues that the enforcement of the limitation of remedies clause causes the contract to "fail of its essential purpose." If a limited remedy provided for in a contract "fails of its essential purpose" then alternative remedies may be provided in accordance with the UCC. MCL 440.2719(2); MSA 19.2719(2). An agreed upon remedy "fails of its essential purpose" when unanticipated circumstances cause the seller to be unable to provide the buyer with the remedy to which

the parties agreed. *Price Bros Co v Charles J Rogers Construction Co*, 104 Mich App 369, 374; 304 NW2d 584 (1981). Plaintiff argues that the sole purpose of the contract was to protect it from environmental damages by installing the above ground system. The appropriate question, however, is what was the essential purpose of the remedy agreed upon between the parties. It appears that the "essential purpose" of the remedy was to warrant any component parts of the system and to allocate the risk of any consequential environmental damage to plaintiff. Thus, as defendant continues to warrant the component parts, this remedy did not fail of its essential purpose. The contract explicitly allocated consequential damages to plaintiff and its failure to obtain other protection from this risk does not mean that the remedy failed of its essential purpose.

Affirmed.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ Jane E. Markey

[1] The Hale Company of Lower Michigan was dissolved on July 15, 1993, and its assets were purchased by The Hale Company of Michigan, Inc. The contract in dispute was assigned to the latter company. Therefore, in this opinion, we will use the term "defendant" only.